SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1187

BERTHA FRIEND, MIDDLE ATLANTIC TRANSPORTATION COMPANY, AND MILBURN MARTIN,
Petitioners,

vs.

FRED J. FRIEND,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinions of the Courts Below

The opinion in the District Court is reported in 61 F. Supp. 101 and is printed in the record at pp. 26-29.

The opinion of the Circuit Court of Appeals is reported in 153 F. (2d) 778, and is printed in the record at pp. 55-58.

II

Jurisdiction

See statement in Part B of the foregoing petition which is not repeated here in the interest of brevity.

III

Statement of Case

See Part A of the foregoing petition which is not repeated here in the interest of brevity.

IV

Specifications of Errors

The Circuit Court of Appeals erred: (1) in holding the District Court could not exercise jurisdiction over the plaintiff's claim against respondent Fred J. Friend; (2) in reversing the judgment of the District Court as against defendant Fred J. Friend.

V

ARGUMENT

1. Summary of Argument

Point A: The decision of the Circuit Court of Appeals involves an important question of procedure in the federal courts, which has not been, but should be decided by this Court.

Point B: The decision of the Circuit Court of Appeals apparently is in conflict with applicable decisions of this Court.

Point C: The decision of the Circuit Court of Appeals is in conflict with decisions of other circuit courts of appeals on the same matter.

Point D: The decision of the Circuit Court of Appeals is in conflict with the weight of authority on this question.

2. Point A: Question Involved Should Be Settled by This Court

The problem of jurisdictional requirements for third-party practice under Rule 14 (a) of the Rules of Civil Procedure for the District Courts of the United States never has been passed upon by this Court. The issue is squarely presented in the instant case. This problem is

one of considerable importance in view of the wide application of which this rule is capable. The question should be settled by this Court so that existing confusion and uncertainty as to the application of the rule may be terminated.

Magnum Import Co. Inc. v. *Coty* 262 U. S. 159, 163.

3. Point B: Conflict of Circuit Court Decision With Applicable Decisions of This Court

Even before the present rules of civil procedure were adopted, it was well established that a federal court had "ancillary" jurisdiction to complete adjudication of interrelated matters where its jurisdiction had once been competently invoked.

Moore v. *N. Y. Cotton Exchange* 270 U. S. 593;
Hurn v. *Oursler* 289 U. S. 238;
Alexander v. *Hillman* 296 U. S. 222.

Against this background, Rule 14 and Official Form 22 were adopted by this Court. (See Appendix of Forms to Federal Rules.) It is significant that Form 22, unlike the forms for original complaints omits any allegation of jurisdiction indicating that the third-party proceeding is regarded as ancillary, and does not require separate jurisdictional grounds. This view is noted in 1 Moore's Federal Practice, p. 782, and is relied upon in the following cases:

Crum v. *Appalachian Elec. Power Co.* S. D. W. Va. 27 F. Supp. 138;
Satink v. *Holland Township* D. N. J. 28 F. Supp. 67.

4. Point C: Conflict of Circuit Court Decisions With Decisions of Other Circuit Courts of Appeals

The instant case flatly holds that a plaintiff cannot assert a claim against a third-party defendant impleaded under Rule 14 (a), where the plaintiff and such party are citizens of the same state, and federal jurisdiction does not otherwise appear.

This holding is in conflict with the decision in the case of *Williams* v. *Keyes* 5 Cir., 125 F. 2d 208, certiorari denied by this Court, 316 U. S. 699, holding that the district court was not ousted of jurisdiction where the defendants after removing the action from a state court, impleaded other defendants who were of the same citizenship as plaintiff.

In accord with *Williams* v. *Keyes,* supra, is *People of the State of Illinois* v. *Maryland Casualty Co.,* 7 Cir., 132 F. 2d 850, affirming decision of District Court, N. D. Illinois, 2 F. R. D. 241.

5. Point D: Conflict of Circuit Court Decision With Weight of Authority

The narrow view of the concept of "ancillary" jurisdiction implicit in the decision of the circuit court is not in accord with the great weight of authority.

See the case of *O'Brien* v. *Richtarsic,* D. W. D. N. Y. 2 F. R. D. 42, involving impleader of a third-party joint tort-feasor in an automobile accident case. It was there said (Knight, D. J.) (p. 44):

> "While the third-party claim sets up a separate cause of action from that in the original complaint, the transactions involved in both complaints are the same and it seems to me the clearly expressed intent of the Federal Rules of Civil Procedure is that such claims might be joined as in aid of the original suit and to prevent relitigation of matters related to the

same transaction and that therefore the third-party claim is ancillary. I think this view accords with Moore's Federal Practice, Vol. 1, p. 779 et seq.; 45 Yale Law Journal 393; Clark and Moore 'A New Federal Civil Procedure'; Hughes Federal Practice, Vol. 17, Sec. 20800, p. 500, et seq."

See, also, the opinion of Judge Chesnut in *Tullgren* v. *Jasper* D. Md. 27 F. Supp. 413, 417:

> "We are dealing here with procedural matters only and there is substantial ground for the view that as the general jurisdiction of the court properly attached under constitutional and statutory provisions to the suit between the original plaintiff and the original defendant, it should proceed to do final and complete justice as between all parties affected by or liable on account of the same set of facts."

The weight of authority supports this view.

See cases collected in 1 Moore's Federal Practice, 1945, Cum. Supp. p. 356, note 1; and in Annotation 148 A. L. R. 1182, 1186 et seq.

The commentators generally have supported this view.

See:

Clark and Moore, *A New Federal Civil Procedure*, 44 Yale L. J. 1291, 1322;

Shulman and Jaegerman, *Some Jurisdictional Limitions on Federal Procedure*, 45 Yale L. J. 393, 421;

Holtzoff, *Some Problems under Federal Third-Party Practice*, 3 La. L. Rev. 408;

Federal Jurisdiction—Third-Party Interpleader—Diversity Problems under Rule 14, 40 Columbia L. Rev. 148, 153;

Federal Third-Party Practice and Diversity Jurisdiction: A Conflict, 53 Harvard L. Rev. 449, 458;

26 Va. L. Rev. 117, 376;

24 Minn. L. Rev. 126.

No better statement of the spirit and purpose of the rule (Rule 14a) and of the construction which should be accorded to it can be found than that of Judge Clark in the case of *Lesnik* v. *Public Industrial Corporation*, 2 Cir., 144 F. (2d) 968, 973:

> "These rules are a part of that fundamental tenet of modern procedure that joinder of parties and claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court. They should therefore receive such favorable construction as is possible, consistent with due recognition of the settled principle that procedural rules cannot be used to extend federal jurisdiction or venue. Rule 82. But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. Cf. *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454."

VI

Conclusion

It is therefore respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, in order that the important question of federal jurisdiction and procedure here involved may be decided by this Court, and that to such an end a writ of certiorari should be granted and this Court should review the judgment of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

PHILIP R. SHIFF,
Counsel for Petitioners.